Supreme Court, U.S.
FILED
SEP 23 1992
OFFICE OF THE CLERK

No. 92-121

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

PAUL L. HOFTYZER AND ETHEL FAIRCLOTH,
Co-Administrators of The Estate of
Devin L. Faircloth, Deceased,

Petitioner,

v.

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

PETITIONER'S REPLY BRIEF

PATRICIA A. SMITH *,
SANDERS, O'DONNELL & SMITH
515 King Street, Suite 400
Alexandria, Virginia 22314
(703) 549-2080
Counsel for Petitioner.

September 23, 1992

Washington, D.C. • THIEL PRESS • (202) 328-3286

Page

TABLE OF CONTENTS

ARGUMENT 2

Petitioner Properly Assigned Error And Preserved The Questions Presented. 2

CONCLUSION 7

TABLE OF AUTHORITIES

Cases:

Farrow v. Commonwealth, 197 Va. 353, 89 S.E.2d 312 (1955). 3

Harlow v. Commonwealth, 195 Va. 269, 77 S.E.2d 851 (1953). 4

Jones v. Christian, 86 Va. 1017, 11 S.E. 984 (1890). 3

Omohundro v. Arlington County, 194 Va. 773, 75 S.E.2d 496 (1953). 4

Spencer v. Commonwealth, 240 Va. 78, 393 S.E.2d 609 (1990). 3

Federal Statutes, Rules:

28 U.S.C. § 1257. 6

Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. § § 1001, *et seq.* 4
29 U.S.C. § 1132(e)(1) 5

U.S. Supreme Court Rule 10 6

State Statutes, Rules:

Va. Sup. Ct. R. 5:17(c). 2

Va. Sup. Ct. R. 5:25 . . . . . 2, 3

No. 92-121

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1992

PAUL L. HOFTYZER AND ETHEL FAIRCLOTH,
Co-Administrators of The Estate of
Devin L. Faircloth, Deceased,

Petitioner,

v.

THE PRUDENTIAL INSURANCE COMPANY
OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI
TO THE SUPREME COURT OF VIRGINIA

PETITIONER'S REPLY BRIEF

COME NOW Paul L. Hoftyzer and Ethel Faircloth, Co-Administrators of the Estate of Devin L. Faircloth, and submit this Reply Brief. In reply to the Respondent's brief opposing the Petition for Writ of Certiorari, your Petitioner relies in all respects upon its Petition for Writ of Certiorari. In this reply brief, Petitioner will

address only one new issue raised by the Respondent, its argument in Section II.A. of its brief claiming that Petitioner's questions presented in the Petition are moot.

ARGUMENT

PETITIONER PROPERLY ASSIGNED ERROR AND PRESERVED THE QUESTIONS PRESENTED.

In its Brief in Opposition, the Respondent claims that Petitioner failed to assign error to the trial court's ruling on Petitioner's Cross-Bill of Complaint, and that failure renders the questions presented in its Petition moot. Respondent's contentions are incorrect, and are based upon a fundamental misunderstanding both of the assignments of error made by the Petitioner and the law in Virginia regarding requirements for assignments of error.

In this case, the trial court entered one final judgment decree. That one decree addressed both the Cross-Bill of Complaint and the Respondent's Bill of Complaint. Appendix D at 15a. Notice of appeal was taken from the whole of the final judgment (stating that Petitioner was aggrieved by the final judgment of the trial court entered October 9, 1991, and that petitioner noted his appeal therefrom).

The Virginia Supreme Court does require assignments of error to be stated in a petition for appellate review. Va. Sup. Ct. Rules 5:25; 5:17(c). The purpose of assignments of error is to inform the appellate court and opposing counsel of what errors committed by the trial court are *grounds for reversal of the judgment or decree.* In other words, they are to state the specific reasons why the judgment should be reversed. The one final decree in this case covered both the Bill of Complaint and the

Cross-Bill. Appendix D. Petitioner needed only to specifically state the grounds or reasons for reversal of that final decree as his assignments of error.

Apparently, Respondent believes that Petitioner needed to generally state an additional assignment of error that the trial court erred in denying his Cross-Bill. However, such general assignments of error are insufficient and will not be noticed by the Virginia Supreme Court. *See generally Spencer v. Commonwealth,* 240 Va. 78, 99, 393 S.E.2d 609, 622 (1990) (petitioner must give specific grounds or reasons why the judgment of the court should be reversed, and not general statements); *Farrow v. Commonwealth,* 197 Va. 353, 366, 89 S.E.2d 312, 320 (1955) (assignment generally stating that an error was made in giving improper jury instructions does not specifically point out the errors nor identifies the instructions contended to be erroneously given and refused; assignment of error insufficient to warrant consideration); *Jones v. Christian,* 86 Va. 1017, 11 S.E. 984 (1890) (sweeping assignment of error that court erred in dissolving injunction too general for consideration on appeal); Va. Sup. Ct. R. 5:25 (assignment of error that the judgment is contrary to the law and evidence is insufficient).

Instead of making such general statements as an assignment of error, the Virginia Supreme Court requires counsel to state specifically the reasons why a judgment must be reversed. As that court has stated:

> The purpose of exceptions in the trial court below and assignments of error in this court is to point out the specific error committed by the trial court. Counsel should be required to "lay his finger on the error."

Omohundro v. Arlington County, 194 Va. 773, 778, 75 S.E.2d 496, 499 (1953) *citing First National Bank v. William R. Twigg Co.*, 106 Va. 327, 342, 56 S.E. 158, 163 (1907). In *Harlow v. Commonwealth*, the court expanded upon this requirement when it stated:

> The purpose of assignments of error is to point out the errors with reasonable certainty in order to direct this court and opposing counsel to the points on which appellant intends to ask a reversal of the judgment, and to limit discussion to these points. Without such assignments, appellee would be unable to prepare an effective brief in opposition to the granting of an appeal, to determine the material portions of the record to designate for printing, to assure himself of the correctness of the record while it is in the clerk's office, or to file, in civil cases, assignments of cross error.

Harlow v. Commonwealth, 195 Va. 269, 271-272, 77 S.E.2d 851, 853 (1953).

In this case, as noted above, the notice of appeal was taken from the whole of the final decree, which addressed both the Bill and the Cross-Bill of Complaint. In making the assignments of error, Petitioner attacked the underlying predicates of the trial court's decisions on the Bill and the Cross-Bill. As is apparent in the letter opinion issued by the trial court, its rulings were predicated upon (1) the decision of the trial court that the Employee Retirement Income Security Act ("ERISA"), 29 U.S.C. §§1001, *et seq.*, did not preempt Respondent's Bill of Complaint; and (2) since ERISA did not preempt Prudential's state law cause of action, the trial court denied Petitioner's *motion in limine* to preclude the introduction of Faircloth's application for insurance as evidence in the trial on the Cross-Bill. *See* Appendix C at 12a. As is

also apparent in that opinion letter, the trial court denied the *motion in limine* only because it found ERISA did not preempt Prudential's cause of action. These two predicates underlying the trial court's final judgment are precisely the assignments of error made by the Petitioner before the Virginia Supreme Court. They comprise the two factors upon which the trial court's entire judgment decree is based and address both the Bill of Complaint and the Cross-Bill. These factors are precisely the reasons why the trial court's judgment decree on both the Cross-Bill and the Bill of Complaint must be reversed, which is what is required to be stated as assignments of error before the Virginia Supreme Court.

PRUDENTIAL complains that Petitioner did not specifically address his Cross-Bill in the assignments of error. However, the second assignment of error pertaining to the *motion in limine* specifically goes to the Cross-Bill. As the Respondent well knows, this is wholly apparent in the Petition for Appeal filed with the Virginia Supreme Court and any claims to the contrary in this Court are disingenuous. The *motion in limine* was based upon Petitioner's motion in the trial court to dismiss PRUDENTIAL's Bill of Complaint as preempted by ERISA. If ERISA preempted that state law cause of action, PRUDENTIAL's Bill of Complaint was a nullity,[1] leaving before the trial court only the Cross-Bill of Complaint. PRUDENTIAL filed its Bill of Complaint on the

[1]PRUDENTIAL's Bill of Complaint would be a nullity because it would have brought a wrong cause of action. Moreover, PRUDENTIAL could not amend its Bill of Complaint to an ERISA-based action in this state court. PRUDENTIAL is an ERISA fiduciary. The federal statute specifically provides for exclusive federal court jurisdiction over an action under ERISA brought by a fiduciary. *See* 29 U.S.C. §1132(e)(1). Only a plan participant or beneficiary has the option of bringing a claim for benefits in either a federal or a state court.

last day of the contestability period, contained in both the Virginia state statute and as stated in the terms of the ERISA plan, in which PRUDENTIAL could be permitted to utilize FAIRCLOTH's application for insurance as evidence in a contest of the validity of the policy. The argument presented under that second assignment of error is that since ERISA preempted PRUDENTIAL's cause of action, PRUDENTIAL only commenced a "contest" of the validity of the policy when it filed an answer to FAIRCLOTH's Cross-Bill of Complaint, resulting in a contest on validity being commenced outside the two-year period permitted. Thus, the application should not have been used in evidence at trial on the Cross-Bill. Without the application as evidence, the trial court had no evidence of any misrepresentations made by FAIRCLOTH. Obviously, this second assignment of error specifically addresses the Cross-Bill of Complaint and the reasons why the trial court's judgment would have to be reversed. That assignment of error was not specifically noted in this Court beacuse it is predicated upon ERISA pre-emption, and the issue itself is uniquely one of state law, the definition of a contest in an insurance policy, and is not a matter of a federal question.[2] Once this Court rules that ERISA preempts the common law cause of action at issue here, all decisions resulting from the trial court's contrary erroneous determination on that issue also fall and the case must be remanded for dismissal of the Bill of Complaint and for retrial as an ERISA action on the Cross-Bill of Complaint.

In the Virginia Supreme Court, the Respondent raised this same mootness argument, which was ignored by that

---

[2] *See* 28 U.S.C. §1257; U.S. Sup. Ct. R. 10.

court in proceedings there. This Court should do likewise. Contrary to the argument of the Respondent, Petitioner has properly made his assignments of error and properly preserved the issues brought to this Court in his Petition for Writ of Certiorari. The questions presented to this Court are not moot.

CONCLUSION

For the foregoing reasons and those stated in the Petition for Writ of Certiorari, Petitioner prays this Honorable Court to grant the Writ of Certiorari, reconsider and reverse the decisions of the Virginia Supreme Court and the lower court and remand for trial.

Respectfully submitted,

PATRICIA A. SMITH
SANDERS, O'DONNELL & SMITH
515 King Street, Suite 400
Alexandria, Virginia 22314
(703) 549-2080
Counsel for Petitioner.

September 23, 1992